U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 07 2007

SRC 06 038 51513

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Dearnick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a medical practice. It seeks to employ the beneficiary permanently in the United States as an infectious disease physician pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we find that the petitioner has overcome the director's concerns.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on July 28, 2005. The proffered wage as stated on the ETA Form 9089 is $145,350 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 1, 2004.

On the petition, the petitioner claimed to have an establishment date in 2001, a gross annual income of $1,250,000, no net income and eight employees. In support of the petition, the petitioner submitted its 2003 and 2004 Internal Revenue Service (IRS) Form 1120 U.S. Corporate Income Tax Returns, filed as a personal service corporation.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 29, 2005, the director requested additional evidence pertinent to that ability. Specifically, the director requested evidence of wages actually paid to the beneficiary.

In response, the petitioner submitted the beneficiary's Form W-2 Wage and Tax Statement for 2004 reflecting wages of $58,333. While counsel asserted that the petitioner was also submitting recent paychecks for the beneficiary, that evidence was not included. The director determined that the petitioner was not paying the beneficiary the proffered wage and that petitioner's net income and net current assets as reflected on its tax returns did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Thus, on December 12, 2005, the director denied the petition.

On appeal, filed before the petitioner can reasonably be expected to have filed its 2005 income tax return, counsel notes that the petitioner is a personal service corporation that pays out all its net income to its two owners and that the beneficiary's 2004 wages cover employment after August 1, 2004 only. While counsel asserts that the petitioner was paying the beneficiary $140,000 annually in 2005, the petitioner submits evidence that it had paid the beneficiary year-to-date wages of $151,666.60 as of December 31, 2005, the year the priority date was established. As the petitioner responded to the director's request for additional evidence on December 7, 2005, the beneficiary's final paycheck for 2005, while relevant to eligibility as of the priority date, was unavailable at that time. Thus, we will consider this evidence on appeal.

The tax returns submitted reflect the following information for the following years:

	2003	2004
Gross income	$998,895	$1,080,816
Net income	$6,010	$114
Compensation of officers[1]	$532,604	$493,407
Current Assets	$16,841	$8,289
Current Liabilities	$15,687	$10,964
Net current assets	$794	($2,675)

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has now established that it employed and paid the beneficiary the full proffered wage in 2005 when the priority date was established. Thus, we need not discuss, pursuant to *Matter of Sonegawa*, 12 I&N Dec. at 612 (Reg. Comm. 1967), the fact that the petitioner, a personal service corporation,[2] distributed large amounts as compensation to its two owners.

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[1] According to Schedule E, these amounts were divided roughly evenly between the two owners.

[2] The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2005. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.

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profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate.